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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS EUGENE ALCARAZ,

Defendant and Appellant.

H031733

(Santa Clara County
Super. Ct. No. CC584587)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on January 14, 2010, be modified as follows:

1. On page 2, second full paragraph beginning “Defendant Thomas” is deleted and the following paragraph is inserted in its place:

Defendant Thomas Eugene Alcaraz pleaded no contest to being a misdemeanor in possession of a firearm, and a jury convicted him of second degree murder and reckless driving while fleeing a peace officer and further found that in committing the murder, defendant personally and intentionally discharged a firearm causing death. (Pen. Code, §§ 187, 189, 12021, subd. (c)(1), 12022.5, subd. (a), 12022.53, subd. (c); Veh. Code, § 2800.2, subd. (a).)¹ The court imposed a term of 15 years to life for the murder and a consecutive enhancement term of 25 years to life under section 12022.53, subdivision (d) for personally and intentionally discharging a firearm and causing death; the court stayed the additional enhancement term of four years

for personally using a firearm under section 12022.5, subdivision (a). (See § 12022.53, subdivision (f).) The court also imposed concurrent two-year terms for unlawful possession of a firearm and reckless driving.

2. On page 2, at the beginning of footnote 1, before the paragraph beginning “All further” the following is inserted so the footnote reads as follows:

¹The verdict form on the enhancement allegations reflects findings that defendant personally and intentionally discharged a handgun causing death within the meaning of Penal Code section 12022.53, subdivision (c), and that he personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). At sentencing, the court noted that the former subdivision citation was a clerical error and corrected it to read Penal Code section 12022.53, subdivision (d). The court imposed the enhancement provided in that subdivision.

All further unspecified statutory references are to the Penal Code.

3. On page 38, under the heading “VII. DISPOSITION” the paragraph, beginning with “The judgment” is deleted and the following paragraph is inserted in its place:

The judgment is reversed with directions as follows: If the District Attorney does not elect to retry the murder charge and enhancement allegations to that charge within 60 days after the filing of the remittitur in the trial court pursuant to section 1382, subdivision 2—unless time is waived by defendant—the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect convictions for (1) voluntary manslaughter (§ 192) with an enhancement for personally using a firearm (§ 12022.5, subd. (a)), (2) being a misdemeanor in possession of a firearm (§ 12021, subd. (c)(1)), and (3) reckless driving (Veh. Code, § 2800.2, subd. (a)). The court shall resentence defendant accordingly. (E.g., *People v. Edwards* (1985) 39 Cal.3d 107, 118 [similar disposition]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1596 [same]; *People v. Garcia* (1972) 27 Cal.App.3d 639, 648 [same].)

Appellant’s petition for rehearing is denied.

This modification changes the judgment.

Dated:

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.